

FEDERAL ELECTION COMMISSION

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Washington, D.C. 20463

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FIRST GENERAL COUNSEL'S REPORT

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DATE COMPLAINT FILED: May 29, 2012

DATE OF NOTIFICATION: May 31, 2012

RESPONSE RECEIVED: June 19, 2012

DATE OF ACTIVATION: November 26, 2012

EXPIRATION OF SOL: Earliest: May 24, 2017

Latest: June 12, 2017

COMPLAINANT:

Washoe County Republican Central Committee

RESPONDENTS:

Nevada State Democratic Party and Jan Churchill
in her official capacity as treasurer

Berkley for Senate and Steven W. Mele
in his official capacity as treasurer

RELEVANT STATUTES
AND REGULATIONS:

2 U.S.C. § 431

2 U.S.C. § 441a(a)

2 U.S.C. § 441a(d)

2 U.S.C. § 441d

11 C.F.R. § 100.22

11 C.F.R. § 100.52

11 C.F.R. § 100.87

11 C.F.R. § 104

11 C.F.R. § 109.30

11 C.F.R. § 109.32

11 C.F.R. § 109.34

11 C.F.R. § 109.37

11 C.F.R. § 110.2

11 C.F.R. § 110.11

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

This matter involves allegations that the Nevada State Democratic Party and Jan Churchill in her official capacity as treasurer ("Nevada Democratic Party") made an excessive

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1 in-kind contribution to Berkley for Senate and Steven W. Mele in his official capacity as
2 treasurer (the "Committee") and failed to include an appropriate disclaimer on mailers.

3 The Complaint alleges that the Nevada Democratic Party created and distributed at least
4 two mail pieces that did not qualify as "party exempt" expenditures, which resulted in excessive
5 in-kind contributions to the Committee. *See* 2 U.S.C. § 441a(a); 11 C.F.R. §§ 100.87,
6 110.11(d)(3)(e). The Nevada Democratic Party and the Committee filed a joint response
7 denying any violation of the Federal Election Campaign Act of 1971, as amended (the "Act").
8 Resp. at 1 (June 19, 2012). Respondents asserts that the Nevada Democratic Party did not pay
9 for the mailers as "party exempt" expenditures under 11 C.F.R. § 100.87, but instead paid for the
10 mailers as coordinated party expenditures under 2 U.S.C. § 441a(d). The Nevada Democratic
11 Party further contends that these mail pieces included the appropriate disclaimer for such
12 coordinated party communications, as set forth in 2 U.S.C. § 441d and 11 C.F.R.
13 § 110.11(d)(1)(ii).

14 We recommend the Commission find no reason to believe that the Nevada State
15 Democratic Party and the Committee violated 2 U.S.C. § 441a by making or receiving excessive
16 in-kind contributions. We also recommend that the Commission find no reason to believe that
17 the Nevada Democratic Party violated 2 U.S.C. § 441d and 11 C.F.R. § 110.11 by distributing
18 communications without the appropriate disclaimer.

19 **II. FACTUAL AND LEGAL ANALYSIS**

20 **A. Background**

21 The Act provides limitations on the amount of contributions that a committee may make
22 to a candidate. 2 U.S.C. § 441a(a). A multicandidate committee may not make contributions "to
23 any candidate and his authorized political committee with respect to any election for Federal

13044340098

1 office which, in the aggregate, exceed \$5,000." *Id.* § 441a(a)(2)(A). The Act grants the national
2 and state committees of a political party special authority, however, to "make expenditures in
3 connection with the general election campaign of candidates for Federal office," in full
4 coordination with the candidates and subject to certain contribution limits.¹ *Id.* § 441a(d); *see*
5 *also* 11 C.F.R. § 109.30. These "coordinated party expenditures" may be made before or after a
6 party's candidate has been nominated, regardless of whether that candidate ultimately becomes
7 the party's nominee, so long as any such expenditures made before the nomination comply with
8 the applicable limits. 11 C.F.R. § 109.34.

9 Payments by the political party for coordinated expenditures must either be treated as in-
10 kind contributions to the candidate under 11 C.F.R. § 100.52(d), or made pursuant to the
11 coordinated party expenditure authority in 2 U.S.C. § 441a(d) and 11 C.F.R. § 109.32. 11 C.F.R.
12 § 109.37(b). Coordinated party expenditures by state committees on behalf of senate candidates
13 may not exceed an amount calculated by multiplying two cents by the voting age population of
14 the state or \$20,000. 11 C.F.R. § 109.32(b). A political party committee must report any
15 coordinated party expenditures, as described in 11 C.F.R. § 104.1-.22.

16 All party coordinated communications made and distributed prior to the date the
17 candidate becomes the party's nominee must meet the disclaimer requirements of 2 U.S.C.
18 § 441d and 11 C.F.R. § 110.11: they must be clear and conspicuous; be of sufficient type size to
19 be clearly readable; be contained in a printed box set apart from the other contents of the

¹ To qualify, a communication that is coordinated between a state or national party committee and a federal candidate or his or her authorized committee must satisfy a three-part test relating to payment, content, and conduct. *See* 11 C.F.R. § 109.37(a)(1)-(3). First, the communication must be paid for in whole or part by the political party committee or its agent. *Id.* § 109.37(a)(1). Second, the communication must be a public communication under Section 100.26 and comply with the further restrictions identified in Section 109.37(a)(2), including for Senate candidates the distribution within the candidate's jurisdiction of certain campaign materials that either expressly advocate the election or defeat of the candidate or refer to her within 90 days of the election. *Id.* § 109.37(a)(2). Third, the communication must also be coordinated between the political party and the candidate's authorized committee or its agents, while satisfying the conduct standard described in Section 109.21(d). *Id.* § 109.37(a)(3).

13044340099

1 communication; and must clearly state who paid for the communication. See 11 C.F.R.
2 § 110.11(c)(2), (d)(1)(ii); *Federal Election Commission Campaign Guide for Political Party*
3 *Committees* at 59-66 (July 2009).

4 **B. The Nevada Democratic Party Mailers**

5 On or about May 24, 2012, prior to the Nevada primary election for the U.S. Senate, the
6 Nevada Democratic Party distributed two mail pieces advocating the election of Congresswoman
7 Shelley Berkley to the Senate. Both mail pieces used (1) pictures of Berkley; (2) Berkley's
8 campaign logo "Shelley Berkley for U.S. Senate"; (3) the disclaimer "Paid for By the Nevada
9 State Democratic Party"; (4) the Nevada Democratic Party's address for the return address; and
10 (5) a non-profit U.S. postage stamp. Compl., Exs. A, B (May 24, 2012). The mail pieces
11 highlighted the putative accomplishments and achievements of Berkley, one of five Democratic
12 primary candidates, and republished various campaign materials, including multiple pictures of
13 Berkley, her family, and campaign slogan. *Id.* They also included the Committee's website, and
14 one included the Committee's phone number. The mail pieces provided a disclaimer set aside in
15 a box, which stated, "Paid for by the Nevada State Democratic Party," and also displayed a
16 "Nonprofit U.S. Postage Paid" stamp of the Democratic Party of Nevada.² *Id.*

17 The Complaint alleges that the Nevada Democratic Party improperly attempted to
18 distribute its mail pieces as "party exempt" mass mailings, which would allow it to expressly
19 advocate the election of Berkley in coordination with the Committee, without having to treat the
20 costs related to the mailings as contributions. Compl. at 2; *see also* 11 C.F.R. § 100.87. The
21 Complaint asserts this was improper because the mailers do not qualify as "party exempt"
22 expenditures, because "party exempt" expenditures may only be executed on behalf of the

² Berkley won the primary election held on June 12, 2012, and became the Democratic Party's senate candidate. On November 6, 2012, she lost the general election to incumbent Senator Dean Heller.

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1 party's nominee or after the primary election has occurred. Compl. at 2; 11 C.F.R. § 100.87.
2 The Complainant therefore concludes that the cost of the mass mailings constituted in-kind
3 contributions to the Committee in excess of the \$5,000 contribution limit set forth in 2 U.S.C.
4 § 441a(a)(2). The Complaint further asserts that the mailers did not comply with the disclaimer
5 requirements for party exempt mailers in violation of 11 C.F.R. § 110.11(d)(3)(e). Compl. at 3.

6 Respondents agree that the Nevada Democratic Party mail pieces do not constitute "party
7 exempt" activities under 11 C.F.R. § 100.87. Resp. at 1-2. Rather, they contend that the mail
8 pieces were coordinated party expenditures, authorized under the Act and Commission
9 regulations, and displayed the appropriate disclaimers for such communications. *Id.* at 1-4
10 (citing 2 U.S.C. § 441a(d); 11 C.F.R. § 109.37(b)).

11 The Complaint applied the wrong regulation to NSDP's mailings. The provision on
12 which the Complainant relied addresses a party committee's use of campaign materials "in
13 connection with volunteer activities on behalf of any nominee(s) of such party." 11 C.F.R.
14 § 100.87. But, the record and allegations provide no basis to conclude that the Nevada
15 Democratic Party distributed the mailers for use in connection with any volunteer activities on
16 behalf of Berkley. Rather, the available information indicates that the Nevada Democratic Party
17 made coordinated party expenditures, as it was permitted to do under 2 U.S.C. § 441a(d) and 11
18 C.F.R. § 109.30. The Nevada Democratic Party paid for the mailer. The mailers clearly
19 identified Berkley, expressly advocated for her election, and were distributed in her jurisdiction
20 within 90 days of the primary election. *See* 11 C.F.R. § 109.37(a)(1)-(3); *see also* 11 C.F.R.
21 § 100.22(a). And the Nevada Democratic Party's disclosure reports show that it complied with
22 the reporting requirements and expenditure limits for coordinated party expenditures set forth in
23 11 C.F.R. §§ 104.1-.22 and 109.32(b). The coordinated party expenditure limit for 2012 general

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election Senate nominees in Nevada was \$187,900.³ The June 2012 Monthly Report discloses that the Nevada Democratic Party made \$80,675 in coordinated party expenditures, relating to the Berkley mailers. Thus, the cost of these mailers, which were the only coordinated party expenditures reported for the 2012 election cycle, did not exceed the coordinated party expenditure limits.

The disclaimers likewise adhered to the requirements of the Act and Commission regulations. The mailers include a disclaimer that states "Paid for by Nevada State Democratic Party," which is set aside in a box and printed in readable type on the face of the mailers, just below the recipient's address. Because the mailers were distributed before the primary election, the Nevada Democratic Party disclaimer met the requirements for coordinated party expenditures, as set forth in 11 C.F.R. § 110.11(d)(1)(i). *See* 11 C.F.R. § 110.11(d)(1)(ii).

Accordingly, we recommend the Commission find no reason to believe that the Nevada Democratic Party and the Committee violated 2 U.S.C. § 441a by making or receiving excessive in-kind contributions. We also recommend the Commission find no reason to believe that the Nevada Democratic Party violated 2 U.S.C. § 441d and 11 C.F.R. § 110.11 by distributing party coordinated communications without the appropriate disclaimer.

III. RECOMMENDATIONS

- (1) Find no reason to believe that Nevada State Democratic Party and Jan Churchill in her capacity as treasurer violated 2 U.S.C. § 441a by making excessive in-kind contributions;
- (2) Find no reason to believe that Berkley for Senate and Steven W. Mele in his official capacity as treasurer violated 2 U.S.C. § 441a by receiving excessive in-kind contributions;
- (3) Find no reason to believe that Nevada State Democratic Party and Jan Churchill in her capacity as treasurer violated 2 U.S.C. § 441d and 11 C.F.R.

³ *Price Index Adjustments for Expenditure Limitations and Lobbyist Bundling Disclosure Thresholds*, 77 Fed. Reg. 9925 (Feb. 21, 2012).

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§ 110.11 by distributing party coordinated communications without the appropriate disclaimer;

(4) Approve the attached Factual and Legal Analysis;


(5) Approve the appropriate letters; and

(6) Close the file.

Anthony Herman
General Counsel

2/21/13
Date

BY:


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